OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 25, 2015

To:

Hon. James K. Muehlbauer
Circuit Court Judge
P.O. Box 1986
West Bend, WI 53095

Michael S. Holzman
Rosen and Holzman
400 W. Moreland Blvd., Ste. C
Waukesha, WI 53188

Theresa Russell
Clerk of Circuit Court
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Mark Bensen
District Attorney
Washington County
P.O. Box 1986
West Bend, WI 53095-1986

Wyland L. Lubbert, #183524
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

You are hereby notified that the Court has entered the following opinion and order:

2014AP2916-CRNM State of Wisconsin v. Wyland L. Lubbert (L.C. #2010CF362)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Wyland L. Lubbert appeals a judgment convicting him of possession of child pornography in violation of WIS. STAT. § 948.12(1m) (2013-14).[1] Lubbert's appellate counsel, Attorney Michael S. Holzman, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Lubbert was advised of his right to file a response but has not done so. Upon consideration of the no-merit report and an independent

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We affirm the judgment, accept the no-merit report, and relieve Holzman of further representing Lubbert in this matter.

A computer hard drive discovered among Lubbert's possessions when he was arrested for an unrelated offense was found to contain multiple images of child pornography. Lubbert acknowledged that he was the owner of the hard drive. He ultimately was charged with forty-five counts of possession of child pornography. After a trial to the court, he was found guilty of forty-two counts. The trial court imposed a global sentence of twelve years' confinement followed by twelve years' extended supervision on three counts followed by ten years' probation with a withheld sentence on the remaining thirty-nine counts. This no-merit appeal followed.

The no-merit report first considers whether there was sufficient evidence for the trial court to find Lubbert guilty beyond a reasonable doubt. When reviewing the sufficiency of the evidence to support a conviction, this court must affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). No issue of arguable merit could arise in this regard.

It was not disputed that the computer files depicted "photograph[s] … of a child engaged in sexually explicit conduct." WIS. STAT. § 948.12(1m). The only issue was whether Lubbert knowingly possessed or accessed the material. *See* § 948.12(1m)(a). Lubbert's former girlfriend, Chandra Loper, testified for the prosecution. The defense theory was that Loper

caused the pornography to be downloaded to frame him to avenge past abuse. Lubbert contended Loper's testimony to the contrary was not credible.

The trial court carefully examined the evidence. It found Lubbert not guilty on three of the counts, as the images' poor quality did not convince it that they depicted child pornography. It also acknowledged inconsistencies in Loper's testimony but overall found her a credible witness. It is for the trier of fact to resolve conflicts in the evidence and to judge its credibility. *See* ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988).

The report also examines whether the sentence was overly harsh or otherwise demonstrated an erroneous exercise of the court's sentencing discretion. The record reveals no basis upon which the sentence could be disturbed.

A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Each of the forty-two counts of which Lubbert was convicted exposed him to a $100,000 fine and/or twenty-five years' imprisonment. He asked for a global sentence of six years' confinement followed by twelve years' extended supervision and received twelve years' each of confinement and supervision, followed by ten years' probation. Lubbert's sentence is not arguably disproportionate to the offense committed.

Lubbert also could not meritoriously contend that the trial court erroneously exercised its discretion in any other manner. The court discussed the "huge need" to protect the public, especially the child victims of pornography, and how Lubbert's long pattern of criminality

reflected on his character and rehabilitation. It considered both mitigating and aggravating factors and, as it must, fully explained the reasons for the sentence on the record. *See* ***State v. Gallion***, 2004 WI 42, ¶¶1, 8, 270 Wis. 2d 535, 678 N.W.2d 197.

The report next addresses Lubbert's claim to appellate counsel that trial and appellate counsel ineffectively failed to investigate potential exculpatory evidence and obtain new evidence to aid in his defense. To succeed on a claim of ineffectiveness assistance of counsel Lubbert would have to show that counsel's performance was deficient and that the deficiency prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687 (l984); ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433.

The gist of Lubbert's claim is that three witnesses—Loper, Tamara Jeske, and Shawn Murphy—would have testified favorably for him but were not called on his behalf. Appellate counsel endeavored to contact each of the three through a private investigator.

Lubbert's ineffective assistance claim has no arguable merit. He does not identify the substance of the testimony he believes Loper would have offered. "[A] defendant who alleges a failure to investigate on the part of his or her counsel must allege with specificity what the investigation would have revealed…." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126. In any event, Loper refused to cooperate. Lubbert does not demonstrate deficient performance or prejudice.

As to Jeske, Lubbert claims she would have contradicted Loper's testimony about giving Jeske an external hard drive for safekeeping. Lubbert never confirmed this with Jeske, however. Since Lubbert's trial, Jeske was in a car accident that left her with extensive brain damage, and she does not recall the computer. Her guardian has prohibited further contact from the defense.

Even if Jeske had been contacted and testified as Lubbert claims she would have, we fail to see any benefit to Lubbert. In assessing Loper's credibility, the court expressly commented on her inconsistent versions of what she did with the hard drive.

Finally, Lubbert alleges that Shawn Murphy, a fellow inmate at Waupun, told him he had seen Loper viewing child pornography on the computer. Murphy ignored appellate counsel's several efforts to contact him. Even if the alleged statement is true, the trial court's finding that Lubbert possessed or accessed the pornography found on his computer is not undermined.

Our independent review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael S. Holzman is relieved of further representing Lubbert in this matter.

Diane M. Fremgen
Clerk of Court of Appeals